

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MAURICE PEARL,

Plaintiff,

vs.

UNITED STATES POSTAL SERVICE,

Defendant.

Case No. 2:11-cv-01404-LDG-CWH

ORDER

Application to Proceed *In Forma Pauperis* (#1) and Screening of Complaint

This matter is before the Court on Plaintiff's Application to Proceed in Forma Pauperis (#1), filed on August 31, 2011.

BACKGROUND

Plaintiff alleges that between September 18, 2009 and November 25, 2009, the United States Postal Service, through its carrier, placed the wrong name on a left notice slip. Due to this error, Plaintiff was not aware that a certified letter sent to him was awaiting receipt at the post office. The certified letter was a notice of a state trial where Plaintiff was to appear *pro se*.

As a result of the error, Plaintiff failed to appear at his jury trial and did not notice witnesses. Plaintiff's case was dismissed. Plaintiff complained to the Postal Service, and a letter was written by a Postal Service representative to the Clerk of Court notifying the court of the error. On appeal, the letter from the postal service accepting blame could not be made part of the trial record.

Plaintiff alleges that the Postal Service deprived him of his due process right to a fair trial. Plaintiff claims that he is entitled to the amount he would have gotten with a fair trial.

1 Plaintiff describes medical damages, presumably related to his dismissed state law claim.

3 DISCUSSION

4 **I. Application to Proceed In Forma Pauperis**

5 Plaintiff filed this instant action and attached a financial affidavit to his application and
6 complaint as required by 28 U.S.C. § 1915(a). Reviewing Pearl's financial affidavit pursuant to
7 28 U.S.C. § 1915, the Court finds that Plaintiff is unable to pre-pay the filing fee. As a result,
8 Plaintiff's request to proceed in forma pauperis in federal court is granted.

9 **II. Screening the Complaint**

10 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a
11 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to
12 dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which
13 relief may be granted, or seeks monetary relief from a Defendant/Third Party Plaintiff who is
14 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be
15 dismissed for failure to state a claim upon which relief may be granted "if it appears beyond a
16 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to
17 relief." *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be
18 dismissed as frivolous if it is premised on a nonexistent legal interest or delusional factual
19 scenario. *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, "a finding of factual
20 frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly
21 incredible, whether or not there are judicially noticeable facts available to contradict them."
22 *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). When a court dismisses a complaint under §
23 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing
24 its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be
25 cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

26 **A. Federal Question Jurisdiction**

27 Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over "all
28 civil actions arising under the Constitution, laws, or treaties of the United States." "A case

1 ‘arises under’ federal law either where federal law creates the cause of action or ‘where the
 2 vindication of a right under state law necessarily turn[s] on some construction of federal law.’”
 3 *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting
 4 *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9, 103 S.Ct. 2841, 77
 5 L.Ed.2d 420 (1983)). The presence or absence of federal-question jurisdiction is governed by the
 6 “well-pleaded complaint rule.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425,
 7 963 L.Ed.2d. 318 (1987). Under the well-pleaded complaint rule, “federal jurisdiction exists
 8 only when a federal question is presented on the face of the plaintiff’s properly pleaded
 9 complaint.” *Id.* Plaintiff expressly alleges a violation under 47 U.S.C. § 553, unauthorized
 10 reception of cable service. However, because the Court finds Plaintiff failed to properly bring a
 11 claim under this statute, or any other federal act (see discussion below), federal question
 12 jurisdiction does not exist at this time.

13 **B. Failure to State a Claim**

14 Plaintiff expressly alleges a violation of 47 U.S.C. § 553, which prohibits the
 15 unauthorized interception or receipt or assistance in intercepting or receiving cable service. The
 16 Court assumes that Plaintiff cites this statute in error, since the alleged facts relate to the postal
 17 service’s error in delivering certified mail. Regardless, none of Plaintiff’s allegations give rise to
 18 a claim under any section of this statute.

19 For the purposes of screening, Plaintiff’s facts as pled allege a claim of negligent
 20 transmission of certified mail. The United States retains sovereign immunity over claims
 21 “arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”
 22 *Anderson v. U.S. Postal Serv.*, 761 F.2d 257, 528 (9th Cir. 1985) (quoting 28 U.S.C. § 2680(b)).
 23 “This provision has been invoked to exclude claims based on delays in delivering a letter,
 24 delivering a letter to the wrong address, or the loss of a registered letter.” *Johnson v. U.S. Postal*
 25 *Serv.*, No. CV-F-09-238, 2009 WL 529877, at *2 (E.D. Cal. Mar. 2, 2009) (citations omitted).
 26 Plaintiff specifically states that the carrier made a “mistake” by placing the wrong name on the
 27 left mail notice provided at Plaintiff’s address. As alleged, this claim is a “negligent
 28 transmission of letters” within the meaning of 28 U.S.C. § 2680. According, Plaintiff’s claim is

1 barred by sovereign immunity.

2 This Court would further lack jurisdiction under the FTCA because Plaintiff has failed to
3 exhaust administrative remedies. Plaintiff is required to file an administrative tort claim in order
4 to assert a claim against the Postal Service. 28 U.S.C. § 2675(a). "The FTCA bars claimants
5 from bringing suit in federal court until they have exhausted their administrative remedies."
6 *McNeil v. U.S.*, 508 U.S. 106, 113 (1993). Plaintiff includes a letter issued by the Postal Service
7 accepting blame for the error, but there is no evidence that Plaintiff filed an administrative tort
8 claim. Thus, Plaintiff does not satisfy his burden of proving subject matter jurisdiction, and his
9 claim is dismissed.

10 If Plaintiff intended to pursue a *Bivens* action, then he will need to allege sufficient facts
11 to constitute such a claim. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388
12 (1971). Plaintiff must allege facts showing that the carrier, acting under color of federal law,
13 deprived him of a right, privilege, or immunity secured by the Constitution and that this
14 deprivation was intentional or willful. Plaintiff's complaint fails to state a claim upon relief can
15 be granted. The Court will grant Plaintiff leave to amend his complaint in accordance with the
16 above discussion, if he is able to do so.

17 Accordingly,

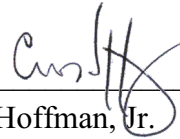
18 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed In Forma Pauperis
19 (#1) is **granted**. Plaintiff shall not be required to pre-pay the full filing fee of three hundred fifty
20 dollars (\$350.00).

21 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this
22 action to conclusion without the necessity of prepayment of any additional fees or costs or the
23 giving of security therefor. This Order granting leave to proceed in forma pauperis shall not
24 extend to the issuance of subpoenas at government expense.

25 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the Complaint
26 (#1-1).

27 **IT IS FURTHER ORDERED** that the Complaint is **dismissed** without prejudice for
28 failure to state a claim upon which relief can be granted, with leave to amend. Plaintiff will have
thirty (30) days from the date that this Order is entered to file his Amended Complaint, if he
believes he can correct the noted deficiencies. Failure to comply with this Order may result in
the Court recommending that this action be dismissed.

DATED this 2nd day of November, 2011.

A handwritten signature in black ink, appearing to read "C.W. Hoffman, Jr.", is written over a horizontal line.

C.W. Hoffman, Jr.

United States Magistrate Judge